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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALICO BUILDING SERVICES, INC.,

Cross-complainant and Respondent,

v.

OSWALDO A. CAMERO,

Cross-defendant and Appellant.

G037213

(Super. Ct. No. 06CC03157)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Gould & Associates and Michael A. Gould for, Cross-defendant and Appellant.

Eadington, Merhab & Eadington, George Eadington, David A. Sprowl and Margot M. Nelson for, Cross-complainant and Respondent.

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Cross-defendant Oswaldo A. Camero appeals from an order denying his motion to strike the cross-complaint of Calico Building Services, Inc. under Code of Civil Procedure section 426.16 (anti-SLAPP motion; all further statutory references are to this code). He contends the court erred when it concluded the cross-complaint did not arise out of protected activity. We disagree and affirm.

## FACTS

Camero worked for Calico as a janitorial supervisor for about five years. After his employment terminated, he filed suit against Calico seeking unpaid overtime wages and wages accrued at the time of termination. After the complaint was filed, Calico and its counsel sent letters to Camero and his lawyer stating that if Camero dismissed the case, Calico would not cross-complain against him or bring criminal charges for alleged misappropriation of trade secrets, unfair competition, and related business torts. Calico had already filed a separate action against other former employees in connection with these claims.

When Camero did not dismiss his complaint, Calico cross-complained alleging 10 causes of action for, including, breach of contract, misappropriation of trade secrets, unfair competition, conversion, interference with prospective business advantage and breach of fiduciary duty. The gist of the cross-complaint was that Camero used Calico's confidential information and trade secrets to unfairly compete with Calico in breach of his fiduciary duties.

Camero then filed an anti-SLAPP motion to dismiss the cross-complaint, arguing that his complaint for unpaid wages was protected activity under the statute and that Calico could not show it had a probability of prevailing on the merits of its claims. The court denied the motion, ruling that the cross-complaint did not arise out of acts in furtherance of free speech in connection with a public issue.

## DISCUSSION

Section 425.16, subdivision (b)(1) provides a party may bring a special motion to strike any “cause of action against [him] arising from any act [he commits] in furtherance of [his] right of petition or free speech under the United States or California Constitution in connection with a public issue . . . .” An “‘act in furtherance of a person’s right of . . . free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a . . . judicial proceeding . . . ; . . . (4) or any other conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

To prevail on the motion, Camero must show the cross-complaint arises from his exercise of free speech (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67), that is, the “act underlying [Calico’s] cause of action must *itself* have been an act in furtherance of the right of . . . free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Camero asserts he has met this requirement because the cross-complaint arises from the filing of his complaint for overtime pay, a protected exercise of free speech under section 425.16, subd. (e)(1). We are not persuaded. Calico has alleged causes of action for unfair competition, misappropriation of trade secrets, and related business torts. Thus, the cross-complaint was not based on Camero’s suit to recover overtime pay. (See *Santa Monica Rent Control Board v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1318 [when landlord of rent-controlled apartments applied to raise rent, rent control board sued him for charging illegal rent; grant of anti-SLAPP motion reversed because suit based on violation of rent ordinance, not application].)

That the filing of the complaint may have triggered the cross-complaint does not satisfy the “arising from” requirement. (*City of Cotati v. Cashman, supra*,

29 Cal.4th at p. 77.) Nor is the fact that the cross-complaint may have been filed in retaliation for the complaint or is an oppressive litigation tactic sufficient. (*Id.* at p.78.) Thus, the two letters sent by Calico calling for Camero to dismiss his complaint or face a cross-complaint are not relevant to his burden to show the cross-complaint arose from protected activity. In addition, that Calico did not name Camero in its separate complaint against other former employees has no bearing on the issue before us.

We also reject Camero’s claim based on the employee handbook. The cross-complaint alleges he was required to read and comply with terms set out in the handbook, including keeping company information confidential, and by failing to do so, he breached the handbook. Camero claims that the handbook also contains information as to his compensation, the subject of his complaint. But this is not a sufficient nexus to satisfy the “arising from” requirement. Likewise, allegations in the cross-complaint about Camero’s duties, which are partly the basis for his claims for overtime, are too tangential to meet his burden.

There are a few allegations in the several causes of action in the cross-complaint that Camero disclosed confidential information owned by Calico and solicited its existing and prospective clients. Conceivably, this could be free speech in connection with a public issue and thus protected (§ 425.16, subd. (e)(1), (4)), although we need not and do not decide that issue. Causes of action containing allegations of protected and unprotected activity are commonly referred to as “mixed,” and in those cases, anti-SLAPP protection applies “unless the protected conduct is “merely incidental” to the unprotected conduct.’ [Citations.]” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.)

Here the allegations of speech in the cross-complaint are collateral. The gravamen of the cross-complaint is based on Camero’s wrongful conduct in the form of unfair competition, misappropriation of trade secrets, interference with prospective advantage, and breach of fiduciary duty, not protected speech. “[A] defendant in an

ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech . . . by the defendant.” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) “[C]ollateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Ibid.*)

Because Camero did not show the cross-complaint arises from his exercise of free speech, he did not shift the burden to Calico to demonstrate the probability of prevailing on the merits (*City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 80-81) and we need not consider arguments addressing that issue.

#### DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.